No. 75-1800

In the Supreme Court of the United States

OCTOBER TERM, 1975

JERRY P. CALLAHAN, JR. and NORBERT A. YOUNG,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners, Jerry P. Callahan, Jr., and Norbert A. Young, pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit reversing an order of dismissal of the indictment by the trial court for failure and refusal of the United States to comply with that (the District) Court's order, entered pursuant to a motion made under Rule 16(a)(1)(A) directing the United States to produce statements of prospective Government witnesses.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division of June 30, 1975 is not officially reported but is printed in the Appendix to this Petition (App. A, pp. App. 1-8). The opinion of the United States Court of Appeals for the Seventh Circuit reversing the opinion and order of dismissal of indictment was entered April 15, 1976, and is not yet officially reported but is printed in the Appendix hereto (App. B, pp. App. 9-14).

JURISDICTION

The opinion reversing and the order of reversal (vacation and remand) by the United States Court of Appeals for the Seventh Circuit were both filed on April 15, 1976 (App. B & C). A timely Petition for Rehearing was denied on May 12, 1976 (App. D, p. App. 17). This petition is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. In Title 18 U.S.C. § 3500(a) a limitation on the operation of Rule 16(a)(1)(A) (which directs production of written or recorded statements by the defendant in the custody or control by the government), if such statement, being a confession or admission of guilt by defendant, was made to a prospective governmental witness, not then known to be a government agent, or not a government agent.

STATUTORY PROVISIONS AND RULES INVOLVED

Title 18, Section 3500, United States Code, provides in pertinent part as follows:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession

> of the United States which was made by a government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

Title 18, Section 3501, United States Code, provides in pertinent part as follows:

> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Rule 16 of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides in pertinent part as follows:

> (a) Disclosure of Evidence by the Government.
>
> (1) Information Subject to Disclosure.
>
> (A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent;
>
> • • •

(D) . . .

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), * * * of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

STATEMENT OF THE CASE

Petitioners Callahan and Young were named in a twelve count indictment charging violations of 15 U.S.C. §§645(a) and (b), and 18 U.S.C. §§2(a), 2(b), 201(b)(2), 201(c)(2), 1001 and 1503. (O.R. 1). As to Callahan, the indictment charged him, in nine counts with: 1) aiding, abetting and counseling the making of false Small Business Administration (SBA) disaster loan applications (counts one, four and eight); (2) making false entries in an SBA damage verifier's report (counts two, five and nine); and (3) asking, soliciting, accepting and receiving bribes in return for allowing the fraudulent obtaining of SBA disaster loans (counts three, six and ten). With respect to Young, the indictment charged him, in seven counts, with: (1) aiding, abetting and counseling the making of false SBA disaster loan applications (counts one and four); (2) aiding and abetting the receiving of bribes in return for allowing the fraudulent obtaining of SBA disaster loans (count six); (3) knowingly making and causing to be made a document containing false entries for submission to the SBA in substantiation of a disaster loan application (count seven); (4) making a false disaster loan application (count eight); (5) giving, offering and promising money to defendant

Callahan, an SBA official, with the intent and for the purpose of obtaining an SBA disaster loan (count eleven); and (6) knowingly attempting to obstruct justice by influencing others to testify falsely before the grand jury (count twelve).

Prior to trial, petitioners filed a motion for discovery which asked that the government be ordered to produce "a copy of statements or confessions of the defendant[s] in the possession of government agents or summaries of statements or confessions including: (a) reports or portions of reports which contain the summaries of statements or confessions allegedly made by the defendant[s] to witnesses or third parties whether they are law enforcement officials or not; (b) portions of grand jury testimony which allegedly relate the statements or confessions of the defendant[s] as related to third persons." (R. 9).[1] The trial judge granted the motion insofar as it called for statements of the defendants in the nature of confessions or acknowledgments of guilt made to prospective government witnesses who were not government agents. (R. 30, at 2).

Contending that the discovery order was precluded by the interaction between Rule 16 and Section 3500, the government requested the trial judge reconsider and clarify his order compelling discovery.

Over a protracted period the government and the trial court engaged in in-court sessions to resolve what government counsel professed to be unclear and which the Court essayed to clarify.[2] No useful purpose is served in detail-

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[1] (R. .....) refers to the original record filed on appeal.

[2] In his ultimate opinion, the trial Court characterizes this as "hemming and hawing". (App. A, p. 1).

ing these numerous exchanges, for ultimately the government made it clear it would resist and defy the Court's order of disclosure, and it was determined that the appropriate remedy was an order of dismissal of the indictment. Obviously to clarify and capsulate these many in-court discussions, the trial court wrote a fairly lengthy opinion, which posed the question and otherwise analyzing its determination (App. A). Such decision reflects, in pertinent part:

> ". . . the government has either complied with • • • our supplementary order by turning over all responsive material and information or advising that it has none, with one exception—statements in its possession in the nature of confessions made by a defendant to a third party, non-government agent prospective witness. It concedes that any such statements made to government agents, whether prospective witnesses or not, and any such statements made to third party, non-government agents who are not prospective witnesses, are required by Rule 16 of the Federal Rules of Criminal Procedure, to be given to a defendant. It insists, however, that 18 U.S.C. 3500 relieves it from turning over any such statements made to third party, non-government agent prospective witnesses until such witnesses have actually testified at the trial.
>
> "We find no basis in either Rule 16 or section 3500, for the government's position. The former makes no distinction with respect to the status of the person to whom a confession was made. It simply requires that it be in the possession of the government. Nor does it prescribe the form of such a confession other than that it be reduced to writing. It clearly does not require that the defendant have written or acknowledged the confession and the government concedes that if the same statements had been made to government agents as were here made to third parties, the rule would be applicable."
>
> • • •

> "The government asked orally in open court for a definition of our interpretation of what Rule 16 and our order require them to turn over. We responded that both require disclosure of all confessions and admissions or acknowledgments of guilt in the nature of confessions in the government's possession and without regard to whom made or whether contained in a separate document or incorporated in a report or interview, grand jury testimony or other document. We have been explicit that statements made in the course of defendants' allegedly illegal conduct which may be inculpatory but are not confessions or acknowledgments of guilt are not discoverable under our order. Finally, we invited in camera inspection of any documents in the government's possession about which the United States Attorney had any question as to whether or not, in the court's judgment, they were subject to production under Rule 16 and the court's supplementary order. The government at first declined to do so but subsequently submitted portions of grand jury testimony, most of which did not involve confessions or admissions but simply statements reputedly made by one or the other defendant in the course of the activities constituting the alleged crimes. Several of the statements, however, did constitute admissions or acknowledgments of guilt and we advised the government accordingly.
>
> Subsequently, the government informed us that it would not turn over the confessions in question, that it desired to make a test case of the matter and requested us to dismiss the indictment so that it might appeal our dismissal rather than seek mandamus or interlocutory review. We will accede to that request.
>
> • • •
>
> "Examination of Rule 16, we believe, makes clear that the draftsmen were cognizant of the importance to defendants and their counsel of knowledge that the government possessed information which constituted a confession of guilt and that disclosure in advance

of trial would frequently be necessary to enable defense counsel to investigate the matter and determine what action to take under the circumstances. Such action may not only involve preparing to meet the purported confession at trial, but, more frequently, to consider whether the clients' best interests may not be better served by a guilty plea rather than a trial.

• • •

"There is no assurance, of course, that every disclosure of a confession or admission of guilt in the government's possession will result in a guilty plea. In some instances, the defendant may seek to demonstrate that the alleged confession was never made, that he was not present at the time the witness believes he made it, that the witness incorrectly interpreted his statements, etc. This may be such a case, but having examined the grand jury testimony and the confessions in particular, it is at least conceivable that defense counsel may wish seriously to consider a possible change of plea. In any event, given the impact of a confession or acknowledgment of guilt, a defendant and his counsel should have a reasonable opportunity before trial to prepare to meet it. This is the purpose of Rule 16(a)(1) and it should not be susceptible of avoidance simply because the confession is incorporated in an investigative report or other document rather than in a separate document signed or acknowledged by the defendant. If the government succeeds in establishing that only such confessions are discoverable before trial, we can look for more secrecy and less disclosure in criminal cases, a distinct step backwards so far as justice is concerned." (App. A, pp. 1-8).

The Court of Appeals for the Seventh Circuit reversed holding § 3500 an absolute bar and vacated the order dismissing the indictment, holding in pertinent part:

> "We deem the single issue on review to be: Are the oral statements of prospective Government witnesses incorporating oral statements of a defendant, in the nature of confessions, admissions or acknowledgments of guilt, made to the witness and which were first memorialized only in the recollections of, then recalled by the witness, and transcribed: (a) discoverable prior to trial as "statements of the defendant" pursuant to Rule 16, or (b) precluded from pretrial discovery under § 3500 as "statement of the witness"?
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> • • •
>
> ". . . That conclusion [of the District Court] is in direct conflict with the teaching of *Feinberg* at 1183:
>
> > '[W]here the statement [of the defendant] is originally memorialized only in the recollection of a witness, then it is not discoverable even if that witness' recollection is eventually written or recorded. . . . [O]rdinarily "it is 'manifestly impossible' to reveal the contents and circumstances of a defendant's statement without revealing the contents of the prospective witness' statement which is forbidden by Section 3500."'
>
> "The foregoing rationale of *Feinberg* has been recently relied upon and followed in *United States* v. *Walk*, ... F.2d ....., No. 74-1899 (9th Cir. Dec. 19, 1975).
>
> "We believe the inescapable conclusion is that the delineated portions of the transcribed Grand Jury testimony are 'statement[s]' of 'witness[es]' within the reading of § 3500 and not 'statements of defendants' within the purview of Rule 16.
>
> "We hold that the language of § 3500 precludes Defendants' Rule 16 pretrial discovery and disclosure of the delineated portions of the transcribed Grand Jury testimony of the prospective witnesses under challenge by the Government. *Feinberg*, *Walk*, *Wilkerson*, *Kenny*, and *United States* v. *Dorfman*, 53 F.R.D. 477 (S.D. N.Y. 1971), *aff'd*, 470 F.2d 246 (2d Cir. 1972).

"We refuse to legislate by judicial fiat, as was said at page 1183 of *Feinberg*:

> 'The relief sought by the defendants must come from Congressional revisions of the Jencks Act or amendments to proposed Rule 16(a)(1)(A) to make it coextensive with the ABA Standards, *supra,* whose Section 2.-1(a)(ii) provides for the disclosure of "any written or recorded statements and the substance of any oral statements made by the accused . . . ." We would be able to adopt this standard in the absence of the Jencks Act bar.' " (App. B, pp. 12, 13.)

Petition for Rehearing illuminated the fact that the interpretation of witnesses' statements under § 3500 to include statements incorporating confessions or incriminating admissions of the defendant devitalized Rule 16(a)(1)(A), and, in fact, runs contra to the section next succeeding § 3500 (§ 3501).

REASONS FOR GRANTING THE WRIT

This Court should issue its writ of certiorari in this case to resolve the conflict among the several circuits on the issue of whether a confession or admissions of a defendant made to third parties who are not known to be government agents and who are potential government witnesses at trial, are excepted from the production provisions of Rule 16(a)(1)(A) on the basis that the confession or admissions constitute part of the "statement" of the witness and, therefore, Jencks Act material, not required to be produced until after he completes his direct testimony at trial. We further believe the decision here to conflict with applicable decisions of this Court.

The Circuit conflict demonstrates itself between the Second Circuit in *United States* v. *Crisonia* (1969), 416 F.2d 107, re-affirmed by that circuit in *United States* v. *Percevault,* (1974), 409 F.2d 126, 129, the District of Columbia Circuit in *United States* v. *Bryant* (1971), 439 F.2d 642, and the trial court herein, on the one hand; and the Seventh Circuit herein, which interprets its earlier decision in *United States* v. *Feinberg,* 502 F.2d 1180, to prohibit such pre-trial production as was sought. Into the balance, and (prior to the instant case), is the split decision of the Ninth Circuit in *United States* v. *Walk,* ..... F.2d ..... (No. 74-1899, 12/19/75), where the majority followed the Seventh Circuit, and the dissent found the reasoning and interpretation of the Second Circuit more compelling.

We would respectfully submit that ambiguity is patent, but that reason compels the acceptance of the interpretation of the Second Circuit and the dissent of the Ninth

Circuit, as opposed to the interpretation of the Seventh and majority of the Ninth Circuits.

The mandate of Rule 16(a)(1)(A) very clearly gives the trial judge authority to direct the production of any written or recorded statements made by the defendant in the possession or control of the government. There is no limitation that such power is restricted to a known government agent as to a person not contemplated as a government witness. There is no limitation that statements or confessions attributed to a defendant become other than his statements or his confessions because they are incorporated into a recitation of pertinent events authored by a government non-agent witness.

The decision herein represents that kind of reasoning that was rejected by this Court in the Campbell[3] cases, when the government urged that prior statements of government witnesses found in government agents' reports became the statement of the agent, and not the statement of the witness to whom it was attributed. This Court wholly rejected such reasoning as an excuse to avoid production under *Jencks* when the witness testified on the government's behalf. We submit the decision of the Court of Appeals here is inconsistent with the analogous reasoning of this Court in thus applying *Jencks*.

Rather than prohibiting production under the discovery rules, we submit the Jencks Act (18 U.S.C. 3500) carves out its own exception to its own operation. It clearly prohibits production of statements and reports of government witnesses. But its exception is equally clearly articulated:

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[3] *Campbell* v. *United States*, 365 U.S. 85; *Campbell* v. *United States*, 373 U.S. 487.

> "no statement or report . . . made by a Government witness or prospective Government witness *(other than the defendant)* . . ." shall be producible before trial testimony. (Our emphasis.)

Basic language makes the defendant's statement producible. Nothing could be more obvious than that a defendant is not a government witness nor a prospective one. Therefore, his statements whether made to a government witness or anyone else are producible before trial. Any other interpretation deletes the parenthetical material from the statute.

Any other interpretation certainly makes the placing of the statute next succeeding, 18 U.S.C. §3500, at least, incongruous. Immediately upon the heels of §3500, Congress elected to discuss confessions and the terms of their admissibility in evidence.

Title 18 U.S.C.A. 3501(e) defines a confession as follows:

> "(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

That section states the law as it relates to the admissibility of confessions and inculpatory statements in any criminal prosecution brought by the United States. The statute is crystal clear as to whom a confession can be made. A confession can be made "by any person to any other person," for the statute reads in pertinent part as follows:

> "(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention."

It is quite clear from the statute in question that a confession or admission of guilt does not receive its definition, relevance, or meaning from the person who hears or receives it, but from the substance of the declaration.

The position of the Court below that a confession is a confession when heard by a government agent but not when heard by someone else does not square with the statute.

United States v. *Crisonia,* 416 F.2d 107 (2nd Cir. 1969) is wholly supportive of the trial court below. There, the defendant made a pretrial motion under Rule 16(a)(1) which was denied on the ground that the statements or confessions were made prior to arrest during the actual commission of a crime to non-government agents. The Circuit Court of Appeals held that Rule 16 discovery applies to prearrest statements and confessions made to nongovernment agents.

The Second Circuit drew heavily upon the Notes of the Advisory Committee and the ABA Project on Minimum Standards for Criminal Justice, and concluded:

> "We agree with these conclusions and see nothing in the plain language of Rule 16(a) or the Notes of the Advisory Committee accompanying it which would justify imposing the limitation suggested by the Government. See *United States* v. *Knohl,* 379 F.2d 427, 441-442 (2d Cir.), cert. denied, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967) (dictum)." p. 114-115.

We would also invite the Court's attention to *United States* v. *Bryant,* C.A.D.C., 439 F.2d 642 (1971), which (approving the rationale of *United States* v. *Lumboski,* N.D. Ill., 277 F.Supp. 713 and *United States* v. *Iovinelli,* N.D. Ill., 276 F.Supp. 629) rejected any contention that Rule 16(a)(1)(A) restricts production only to statements and confessions made to government agents. In holding that

statements and confessions made to non-government witnesses prior to arrest were discoverable, the court stated:

> "We agree with a panel of the Second Circuit that 'the Notes of the Advisory Committee indicate that the amended Rule was intended to apply even to prearrest statements made by a defendant during the course of his crime and was meant to broaden materially the scope of discovery available to a defendant * * *'. The Government, moreover, has made no argument for a more niggardly, mechanical interpretation of the word 'statements.' And none occurs to us." p. 649.

We would, further, respectfully commend to this Court's attention the exhaustive analysis of Judge Koelsch in dissenting in *United States* v. *Walk,* ..... F.2d ....., which incorporates the views hereinabove expressed, and more, in a scholarly fashion adapted to practical application.

The confusion and conflicts which are reflected in the several circuits, and indeed within the individual circuits, in a matter of day-to-day consideration in all trial courts in the federal system, makes the question here presented appropriate to this Court's present resolution.

CONCLUSION

Wherefore, for the above and foregoing reasons, the petitioner respectfully prays the Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the reversal of the order of the District Court dismissing the indictment herein for

and because of the Government's refusal to comply with the trial court's order directing compliance with its discovery order.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

JERRY P. CALLAHAN, JR., and
NORBERT A. YOUNG

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74 CR 512

MEMORANDUM OPINION
(Filed June 30, 1975)

The defendants have moved to dismiss the indictment for failure of the government to comply with this court's discovery order of October 24, 1974. After some hemming and hawing, the government has either complied with the requirements of Rule 2.04 and our supplementary order by turning over all responsive material and information or advising that it has none, with one exception—statements in its possession in the nature of confessions made by a defendant to a third party, non-government agent prospective witness. It concedes that any such statements made to government agents, whether prospective witnesses or not, and any such statements made to third party, non-government agents who are not prospective witnesses, are required by Rule 16 of the Federal Rules of Criminal Procedure, to be given to a defendant. It

insists, however, that 18 U.S.C. 3500 relieves it from turning over any such statements made to third party, non-government agent prospective witnesses until such witnesses have actually testified at the trial.

We find no basis in either Rule 16, or section 3500, for the government's position. The former makes no distinction with respect to the status of the person to whom a confession was made. It simply requires that it be in the possession of the government. Nor does it prescribe the form of such a confession other than that it be reduced to writing. It clearly does not require that the defendant have written or acknowledged the confession and the government concedes that if the same statements had been made to government agents as were here made to third parties, the rule would be applicable.

Section 3500, on the other hand, does not purport to limit Rule 16 so far as confessions made by the defendant are concerned and we have been referred to no case which so holds. The government urges very vigorously that *United States* v. *Feinberg*, 502 F.2d 1180 (7th Cir. 1974), may be so construed. We do not so read it.

In *Feinberg*, our colleague Judge Marshall ordered the government to disclose whether any memoranda or verbatim transcriptions of any oral statements by the defendant to government agents or to third persons existed and were in its possession. If so, he ordered the government to disclose the names and addresses of the persons to whom the defendant made such oral statements, the date or dates on which they were made, and the substance thereof. The Seventh Circuit, in a per curiam opinion from Justice Clark, Judge Cummings and Judge Beamer, agreed that all of the information was required to be disclosed under Rule 16(a)(1) of the Federal Rules of Criminal Procedure except the substance of any statements made to prospective government witnesses.

Relying on Rule 16(b) which provides that Rule 16 does not authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in the Jencks Act, the Court concluded that statements by a defendant or conversations with a defendant which are incorporated in the statement of a prospective witness are not producible until after the witness has testified as to such statements or conversations as provided by 18 U.S.C. §3500(b).[1]

It should be noted that *Feinberg* does not deal with confessions as such, but with statements of the defendant. Given the significance, as hereinafter discussed, of confessions or acknowledgments of guilt, we do not believe that the Seventh Circuit intended per curiam to hold that any such confession or acknowledgment of guilt made orally to a prospective government witness, whether government agent or not, is not discoverable by a defendant until after the witness has testified even though the confession is specifically set forth in a written statement of the prospective government witness made after conferring with the defendant.

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[1] The Court did not explain why the same rationale was not applicable to the name and address of the person to whom the statement was made as well as the date thereof, all of which are normally reflected in the same statement of the government witness which contains the substance of the conversation. If the substance is not discoverable, the same analysis would appear to make the other information equally non-discoverable but the per curiam opinion, referring to *Will* v. *United States, infra,* holds to the contrary and the government in *Feinberg* apparently did not even dispute its discoverability.

Such a holding would mean that no confession or acknowledgment of guilt would ever be discoverable before trial by a defendant unless it was in a separate document signed or acknowledged by the defendant and not incorporated in any statement of a possible government witness. There is nothing in the language or history of Rule 16 to indicate that only confessions written or signed by the defendant are discoverable and that any confession made orally and incorporated in a statement of a government agent or other prospective witness may be hidden by the prosecution until after the witness has testified. Yet this is what the government would have us read *Feinberg* to hold.

This may be a slight over-statement since the government apparently concedes that a confession or acknowledgment of guilt made to a government agent who is a prospective witness is discoverable under Rule 16 if incorporated in the agent's written report. *Feinberg,* on the other hand, makes no distinction between prospective witnesses who are government agents and those who are not. If *Feinberg* is applicable to confessions, they are not discoverable if contained in a prospective witness' written statement whether or not such witness is a government agent.

The government asked orally in open court for a definition of our interpretation of what Rule 16 and our order require them to turn over. We responded that both require disclosure of all confessions and admissions or acknowledgments of guilt in the nature of confessions in the government's possession and without regard to whom made or whether contained in a separate document or incorporated in a report or interview, grand jury testimony or other document. We have been explicit that statements made in the course of defendants' allegedly illegal con-

duct which may be inculpatory but are not confessions or acknowledgments of guilt are not discoverable under our order. Finally, we invited in camera inspection of any documents in the government's possession about which the United States Attorney had any question as to whether or not, in the court's judgment, they were subject to production under Rule 16 and the court's supplementary order. The government at first declined to do so but subsequently submitted portions of grand jury testimony, most of which did not involve confessions or admissions but simply statements reputedly made by one or the other defendant in the course of the activities constituting the alleged crimes. Several of the statements, however, did constitute admissions or acknowledgments of guilt and we advised the government accordingly.

Subsequently, the government informed us that it would not turn over the confessions in question, that it desired to make a test case of the matter and requested us to dismiss the indictment so that it might appeal our dismissal rather than seek mandamus or interolcutory review. We will accede to that request.

We also made it clear that if the government had any evidence indicating that the disclosure of either the identity of the prospective witness or the substance of the alleged confession made to such witness would jeopardize the safety and well-being of such witness or the integrity of the government's evidence, we would hear it. If it appeared significant, we would not require any disclosure which might bring harm to any individual or adversely affect the integrity of the government's evidence. We have been assured that no such problems are here involved and that the government desires to keep the substance of the confessions made by defendants to non-gov-

ernment witnesses a secret until trial, solely for the benefits to the prosecution which such secrecy may provide. Inasmuch as the statements of the witnesses here involved were made under oath before the grand jury and, inasmuch as the defendants are government employees charged with organizing and participating in a scheme to defraud the government, there would appear to be no basis for concern either as to human safety or a change in testimony.

Among the most difficult and devastating types of evidence a defendant must face is a confession or acknowledgment of guilt for it represents his admission of the ultimate issue in the case. Conversely, it is frequently very important to the prosecution because it obviates the necessity for meticulous, step-by-step proof beyond a reasonable doubt of each essential element of the alleged crime. Small wonder then that defendants desire a reasonable opportunity to prepare to meet such a confession or admission of guilt while prosecutors seek to hide it until the last possible moment.

Examination of Rule 16, we believe, makes clear that the draftsmen were cognizant of the importance to defendants and their counsel of knowledge that the government possessed information which constituted a confession of guilt and that disclosure in advance of trial would frequently be necessary to enable defense counsel to investigate the matter and determine what action to take under the circumstances. Such action may not only involve preparing to meet the purported confession at trial, but, more frequently, to consider whether the clients' best interests may not be better served by a guilty plea rather than a trial.

Our experience in this regard may be enlightening. The first occasion on which we ordered disclosure of the facts surrounding alleged admissions of guilt by a defendant to third parties was in *United States* v. *Horwitz,* which ultimately became *Will* v. *United States,* 389 U.S. 90 (1967). After mandamus proceedings in the Seventh Circuit which directed us to vacate the order and in the United States Supreme Court which reversed the Court of Appeals, the information, including the substance of the statements to third parties in the government's possession, was finally turned over to defense counsel. Less than 30 days later, defendant requested leave to withdraw his not guilty plea and to plead *nolo contendre.* After more than two years of resistance, the government was compelled to turn over information substantially similar to that being sought here and defense counsel, on reviewing it, determined that a trial would not be in his client's best interests.

We have had a similar experience in a number of other cases, the most recent of which was *United States* v. *Prodromos,* 72 CR 921, in which the government likewise originally resisted disclosure of incriminating statements of the defendant in its possession but was subsequently persuaded to turn them over to defense counsel whereupon the defendant promptly pleaded guilty and an extended trial was obviated.

There is no assurance, of course, that every disclosure of a confession or admission of guilt in the government's possession will result in a guilty plea. In some instances, the defendant may seek to demonstrate that the alleged confession was never made, that he was not present at the time the witness believes he made it, that the witness incorrectly interpreted his statements, etc. This may be such a case, but having examined the grand jury testi-

mony and the confessions in particular, it is at least conceivable that defense counsel may wish seriously to consider a possible change of plea. In any event, given the impact of a confession or acknowledgment of guilt, a defendant and his counsel should have a reasonable opportunity before trial to prepare to meet it. This is the purpose of Rule 16(a)(1) and it should not be susceptible of avoidance simply because the confession is incorporated in an investigative report or other document rather than in a separate document signed or acknowledged by the defendant. If the government succeeds in establishing that only such confessions are discoverable before trial, we can look for more secrecy and less disclosure in criminal cases, a distinct step backwards so far as justice is concerned.

Given the fact that no danger to a government witness or its evidence is here involved, as the United States Attorney concedes, we find the secrecy syndrome to be particularly inappropriate. Since, as the United States Attorney has advised us in person in open court, the government desires to make this a test case even though it concedes that secrecy here serves no useful purpose other than to inhibit the defendants in their efforts to deal with their alleged confessions at trial while disclosure might well obviate the necessity for any trial at all, we will grant the defendants' motions to dismiss the indictment in question. An appropriate order will enter.

/s/ *Hubert L. Will*
United States District Judge

Dated: June 30, 1975

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1820

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JERRY P. CALLAHAN, JR.,
and NORBERT A. YOUNG,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 CR 512
HUBERT L. WILL, *Judge.*

Argued January 6, 1976 — Decided April 15, 1976

Before FAIRCHILD, *Chief Judge,* PELL, *Circuit Judge,* and EAST, *Senior District Judge.**

EAST, *Senior District Judge.* The United States of America (Government) appeals the order of the District

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Court entered on June 30, 1975 dismissing the indictment against the above-named defendants-appellees (Defendants). The dismissal followed the Government's refusal to comply with a Fed. R. Crim. P. 16(a)(1)(A) discovery order to produce the statements of certain prospective Government witnesses. We reverse.

Defendants were charged in a multiple count indictment with various violations of 15 U.S.C. §§ 645(a) and (b) and 18 U.S.C. §§ 2(a), 2(b), 201(b)(2), 201(c)(2), 1001 and 1503 through alleged fraudulent entries and claims, bribery and obstruction of justice in the securing of Small Business Administration loans.

Defendants moved in pretrial discovery, pursuant to Rule 16(a)(1)(A) (hereinafter referred to as Rule 16), for an order requiring the Government to disclose for inspection "a copy of statements or confessions of the defendan[s] in the possession of government agents or summaries of statements or confessions including: (a) . . . (b) portions of grand jury testimony which allegedly relate the statements or confessions of the defendant[s] as related to third persons."

The District Court ordered the Government to disclose to Defendants all portions of prospective Government witnesses' statements "in the nature of an admission or confession or acknowledgment of guilt." The Government sought clarification. In an effort to conform with the order, the Government submitted to the District Court for *in camera* inspection various documents, including a transcript of the oral testimony of several witnesses before the Grand Jury. The District Court delineated those portions of the transcribed oral testimony of two witnesses which it determined to contain inculpatory oral statements by the Defendants and heard by the witnesses, and ordered the Government to disclose those portions to the

Defendants. The Government declined to comply on the premise that the order to disclose or produce under Rule 16 impermissibly conflicted with Government witness protections under the Jencks Act, 18 U.S.C. § 3500 (hereinafter referred to as § 3500.[1] *United States* v. *Feinberg*, 502 F.2d 1180 (7th Cir. 1974); *United States* v. *Wilkerson*, 456 F.2d 57 (6th Cir.), *cert. denied*, 408 U.S. 926 (1972); and *United States* v. *Kenny*, 462 F.2d 1205, 1212 (3d Cir. 1972).

Defendants' motion for a dismissal of the indictment was granted as an appropriate sanction for the Government's failure to comply with the discovery order. The District Court filed a memorandum opinion which, for the purposes of our review, stated as a foundation for the ruling, *inter alia*, that under Rule 16 a Defendant is entitled to disclosure of "all confessions and admissions or acknowledgments of guilt in the nature of confessions in the government's possession and without regard to when made or whether contained in a separate document or incorporated in a report or interview, grand jury testimony or other document."

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[1] The Government tendered to Defendants their relevant written and recorded statements or confessions as required by Rule 16, and in addition, provided the Defendants with the circumstances surrounding relevant admissions made by Defendants to prospective Government witnesses. The Government did not claim that the disclosure would jeopardize the security of any prospective Government witness nor adversely affect the integrity of the Government's evidence, nor did it intimate a certainty that such disclosure would jeopardize the Government's witnesses or case, as it had no information indicating that such a problem might arise. The Government's position is based solely on the premise that the Defendants are seeking the statements of witnesses contra to the provisions of § 3500.

We gather that the District Court was able to rationalize to its satisfaction reasons for not applying the full thrust of the rule in *Feinberg* to the instant motion to produce. We interpret that rationalization as an unannounced by-pass of the rationale of *Feinberg* in favor of a liberal, broad view of interpretation and utilization of Rule 16 as suggested in § 2.-1(a)(ii), ABA Standards Relating to Discovery and Procedure Before Trial (1969), and presently urged upon us by the Defendants. *United States* v. *Crisona,* 416 F.2d 107, 114-15 (2d Cir. 1969); and *United States* v. *Percevault,* 490 F.2d 126 (2d Cir. 1974). *See* the dissenting opinion of Judge Koelsch in *Walk, infra,* at 5.

The thesis of *Crisona* and *Percevault,* and many District Courts in line therewith, seems to be, and not without some justification, a belief that a full pretrial disclosure by the Government of all incriminating evidence under the Government's control will induce the abashed defendant to bow to the inevitable and enter a guilty plea. As much as one might be tempted by such an idealistic view, we are nevertheless not free to follow their broad liberal interpretation of the meaning and utilization of Rule 16. We are satisfied that the course to be traveled in the interpretation and utilization of the Rule is clearly charted in the rationale and holdings of *Feinberg.*

We deem the single issue on review to be: Are the oral statements of prospective Government witnesses incorporating oral statements of a defendant, in the nature of confessions, admissions or acknowledgments of guilt, made to the witness and which were first memorialized only in the recollections of, then recalled by the witness, and transcribed: (a) discoverable prior to trial as "statements of the defendant" pursuant to Rule 16, or (b) precluded from pretrial discovery under § 3500 as "statement of the witness"?

The District Court concluded, erroneously we believe, that the delineated portions of the transcribed Grand Jury testimony of the witnesses ordered to be disclosed were "statements of the defendants" within the meaning of Rule 16. That conclusion is in direct conflict with the teaching of *Feinberg* at 1183:

> "[W]here the statement [of the defendant] is originally memorialized only in the recollection of a witness, then it is not discoverable even if that witness' recollection is eventually written or recorded. . . . [O]rdinarily 'it is "manifestly impossible" to reveal the contents and circumstances of a defendant's statement without revealing the contents of the prospective witness' statement which is forbidden by Section 3500.' "

The foregoing rationale of *Feinberg* has been recently relied upon and followed in *United States* v. *Walk,* ..... F.2d ....., No. 74-1899 (9th Cir. Dec. 19, 1975).

We believe the inescapable conclusion is that the delineated portions of the transcribed Grand Jury testimony are "statement[s]" of "witness[es]" within the reading of § 3500 and not "statements of defendants" within the purview of Rule 16.[2]

We hold that the language of § 3500 precludes Defendants' Rule 16 pretrial discovery and disclosure of the delineated portions of the transcribed Grand Jury testimony of the prospective witnesses under challenge by the

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[2] Any ambiguities in present Rule 16 are entirely eliminated in new Rule 16(a)(1)(A) and 16(a)(2). Under the new rules, the defendant is entitled to discover the substance of his oral statements only if he made them to someone then known to him to be a government agent.

Government.[3] *Feinberg, Walk, Wilkerson, Kenny,* and *United States* v. *Dorfman,* 53 F.R.D. 477 (S.D. N.Y. 1971), *aff'd,* 470 F.2d 246 (2d Cir. 1972).

We refuse to legislate by judicial fiat, as was said at page 1183 of *Feinberg:*

> "The relief sought by the defendants must come from Congressional revisions of the Jencks Act or amendments to proposed Rule 16(a)(1)(A) to make it coextensive with the ABA Standards, *supra,* whose Section 2.-1(a)(ii) provides for the disclosure of 'any written or recorded statements and the substance of any oral statements made by the accused . . . .' We would be able to adopt this standard in the absence of the Jencks Act bar."

The order of dismissal of the indictment entered by the District Court on June 30, 1975 is vacated and the cause is remanded with instructions for the withdrawal of the District Court's Rule 16 discovery order and further proceedings upon the indictment.

Mandate hereon shall issue forthwith.

ORDER OF DISMISSAL VACATED AND CAUSE REMANDED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

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[3] "§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution . . . no statement . . . in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of . . . discovery, or inspection until said witness has testified on direct examination in the trial of the case."

APPENDIX C

Opinion by Judge East

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

April 15, 1976

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William G. East, Senior District Judge *

United States of America,

Plaintiff-Appellant,

No. 75-1820 vs.

Jerry P. Callahan, Jr.,
and Norbert A. Young,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 CR 512
Hubert L. Will, Judge.

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* Honorable William G. East United States District Judge for the District of Oregon, sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, VACATED and cause REMANDED, in accordance with the opinion of this Court filed this date.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
May 12, 1976.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William G. East, Senior District Judge *

United States of America,
Plaintiff-Appellant,

No. 75-1820 vs.

Jerry P. Callahan, Jr.,
and Norbert A. Young,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(74 Cr 512)

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be, and the same is hereby, Denied.

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* Honorable William G. East United States District Judge for the District of Oregon, sitting by designation.

No. 75-1800

In the Supreme Court of the United States

OCTOBER TERM, 1976

JERRY P. CALLAHAN, JR., AND NORBERT A. YOUNG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
IVAN MICHAEL SCHAEFFER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1800

JERRY P. CALLAHAN, JR., and NORBERT A. YOUNG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 534 F. 2d 763. The opinion of the district court is not yet reported (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1976. A petition for rehearing was denied on May 12, 1976 (Pet. App. D). The petition for a writ of certiorari was filed on June 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the government possesses a statement of a prospective witness who is not a government agent, the government can be required, prior to trial,

to produce that part of the statement containing the prospective witness's recollection of oral statements made to him by the defendant.

STATUTORY PROVISION AND RULE INVOLVED

18 U.S.C. 3500(a) provides:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) *Disclosure of Evidence by the Government.*
>
> (1) *Information Subject to Disclosure.*
>
> (A) *Statement of Defendant.* Upon a request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent * * *.
>
> * * * * *

> (2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. §3500.

STATEMENT

Petitioners were charged in a twelve-count indictment filed in the United States District Court for the Northern District of Illinois with various violations of 15 U.S.C. 645(a) and (b), and 18 U.S.C. 2(a), 2(b), 201(b)(2), 1001, and 1503[1] (R. 1).[2] Prior to trial petitioners filed a dis-

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[1]The indictment charged petitioner Callahan with aiding, abetting, and counselling the making of false Small Business Administration (S.B.A.) disaster loan applications (Counts One, Four, and Eight); making false entries in a S.B.A. damage verifier's report (Counts Two, Five, and Nine); and asking, soliciting, accepting and receiving bribes in return for allowing the fraudulent obtaining of S.B.A. disaster loans (Counts Three, Six, and Ten). Petitioner Young was charged with aiding, abetting and counselling the making of false S.B.A. disaster loan applications (Counts One and Four); aiding and abetting the receiving of bribes in return for allowing the fraudulent obtaining of S.B.A. disaster loans (Count Six); knowingly making and causing to be made a document containing false entries for submission to the S.B.A. in substantiation of a disaster loan application (Count Seven); making a false disaster loan application (Count Eight); giving, offering, and promising money to petitioner Callahan, a S.B.A. official, with the intent and for the purpose of obtaining a S.B.A. disaster loan (Count Eleven); and knowingly attempting to obstruct justice by influencing others to testify falsely before the grand jury (Count Twelve).

[2]"R." references are to the documents comprising the original record on appeal as designated by the clerk of the district court.

covery motion asking that the government be ordered to produce "a copy of statements or confessions of the defendant[s] in the possession of government agents or summaries of statements or confessions including: (a) reports or portions of reports which contain the summaries of statements or confessions allegedly made by the defendant[s] to witnesses or third parties whether they are law enforcement officials or not; [and] (b) portions of grand jury testimony which allegedly relate the statements or confessions of the defendant[s] as related to third persons" (R. 9).

The district court granted the motion insofar as it requested production, *inter alia,* of petitioners' statements in the nature of admissions, confessions or acknowledgments of guilt (see R. 30 at 2),[3] even those that were orally made to third-party, nongovernment agent prospective witnesses and first reduced to writing later as a part of the witnesses' statements reporting their recollections of what the petitioners had said. Pursuant to this discovery order, the government identified those prospective witnesses' "statements" which arguably contained such recollections (R. 50 at 8-9). These included certain grand jury transcripts of prospective witnesses' testimony and handwritten, non-verbatim memoranda of interviews of prosective government witnesses. The district court conducted an *in camera* inspection of these documents

[3]In its initial oral ruling on the discovery motion, the court had specified that the government disclose all portions of prospective government witnesses' statements in which were incorporated oral "inculpatory statements" of petitioners, whether made during the course of, or after, the commission of the offenses charged (R. 37, at 7, 8, 9, 12, 13, 17, 30). In response to the government's motion for clarification, the court stated that mere "inculpatory statements" need not be disclosed, but that all statements "in the nature of an admission or confession or acknowledgement of guilt" must be turned over to petitioners (R. 53 at 2, 3).

(R. 30 at 2; R. 53 at 18), and found nothing in the non-verbatim memoranda that required disclosure. But, as reported by the court of appeals (Pet. App. 10-11), "[t]he District Court delineated those portions of the transcribed oral [grand jury] testimony of two witnesses which it determined to contain inculpatory oral statements by the [petitioners] and heard by the witnesses, and ordered the Government to disclose those portions to [petitioners]."

The government complied with all aspects of the district court's discovery order except with regard to the grand jury testimony of two prospective government witnesses (see Pet. App. 1).[4] The government contended that the Jencks Act, 18 U.S.C. 3500, relieves it from the obligation of turning over statements of its prospective witnesses until the witness has testified on direct examination at trial. Petitioners moved to dismiss the indictment for failure to comply with the pretrial discovery order, and the district court granted the motion (Pet. App. A). The government appealed the district court's order pursuant to 18 U.S.C. 3731; the court of appeals vacated the order dismissing the indictment and remanded the case to the district court with instructions to withdraw the discovery order (Pet. App. B).

ARGUMENT

Petitioners contend that under Rule 16(a)(1)(A), Fed. R. Crim. P., the government can be required, prior to trial, to disclose oral statements in the nature of confessions made by petitioners to third persons who are not government agents but who are prospective government

[4]Copies of written or recorded statements made by petitioners were produced by the government, in accordance with Rule 16(a), Fed. R. Crim. P., as were reports of the circumstances surrounding relevant admissions made by petitioners to prospective government witnesses (R. 36, 40; R. 37 at 30).

witnesses, when those statements are reduced to writing only later as part of the witnesses' statements regarding their recollections of what petitioners had said. We note initially that there is no need for this Court to grant the petition for a writ of certiorari at this time. The petition challenges the court of appeals' reversal of the district court's pretrial dismissal of the indictment. That reversal puts petitioner in the same position as if the district court had ruled against him in the first instance; such a ruling would not have been subject to interlocutory appeal. See *Cobbledick* v. *United States,* 309 U.S. 323. Similarly, review now by this Court of the court of appeals' decision here would be premature. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, petitioners are convicted and the convictions are affirmed, they will then be able to present their contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

In any event, the court of appeals correctly concluded (Pet. App. 13-14) "that the language of [the Jencks Act, 18 U.S.C. 3500] precludes [petitioners'] Rule 16 pretrial discovery and disclosure of the delineated portions of the transcribed Grand Jury testimony of the prospective witnesses under challenge by the Government." A similar view has been adopted by several other courts of appeals. *E.g., United States* v. *Walk,* 533 F. 2d 417 (C.A. 9); *United States* v. *Feinberg,* 502 F. 2d 1180 (C.A. 7), certiorari denied, 420 U.S. 926; *United States* v. *Wilkerson,* 456 F. 2d 57 (C.A. 6), certiorari denied, 408 U.S. 926; *United States* v. *Kenny,* 462 F. 2d 1205, 1212 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States,* 409 U.S. 914. See also *United States* v. *Dorfman,* 53 F.R.D. 477 (S.D. N.Y.), affirmed, 470 F. 2d 246 (C.A. 2).

The interplay between Rule 16's provision for disclosure of the defendant's own statements and the Jencks

Act's prohibition against compelling the prosecution to disclose the statements of its witnesses involves what is in most instances a relatively straightforward distinction between two different categories—a distinction that petitioners would virtually obliterate. A statement is discoverable under Rule 16 if it was written by the defendant himself (even though turned over to the government by a prospective witness) or if it was recorded contemporaneously with its utterance by the defendant. On the other hand, oral statements of the defendant are, by explicit provision of the rule, discoverable only if they had been made to a person known by the defendant, at the time the statement was uttered, to be a government agent. It plainly follows that statements that were neither written by the defendant nor recorded when spoken[5] and that were made to a person who was not (or was not known to the defendant to be) a government agent, are, when related to government investigators or to the grand jury by a third party, statements of that person (and not statements of the defendant) for purposes of Rule 16 and of the Jencks Act.

Consequently, as the Seventh Circuit concluded in *Feinberg, supra,* "where the statement is originally memorialized only in the recollection of a witness, then it is not discoverable even if that witness' recollection is eventually written or recorded" (502 F. 2d at 1183). Since it is precisely that kind of statement that is at issue here, the

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[5]There is a potential gray area in the case of statements that were made by the defendant in contemplation that they would be reduced to writing essentially verbatim, but where the reduction to writing is somewhat delayed. *Feinberg, supra,* 502 F. 2d at 1183, suggests that such statements might be discoverable pursuant to Rule 16. But no statements of this kind are involved in the instant case.

court of appeals correctly determined that the government could not be compelled to produce it in advance of trial.

This interpretation of Rule 16 is fully consistent with the Jencks Act, the purpose and legislative history of which "compel[led]" this Court "to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. §3500 cannot be produced at all." *Palermo* v. *United States,* 360 U.S. 343, 351. The statements at issue here are properly characterizable as statements of prospective government witnesses, and disclosure of them can be compelled only after the witnesses have testified on direct examination at trial.[6]

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[6]Contrary to petitioners' claim (Pet. 11), the decision of the court of appeals here does not conflict with decisions in the Second and the District of Columbia Circuits. In *United States* v. *Crisona,* 416 F. 2d 107 (C.A. 2), the court dealt not with the oral statement of a prospective witness recalling oral statements made to him by a defendant, as is the case here, but with a tape recording made of the defendant's conversation with a third party (*i.e.,* a "recorded statement" of the defendant explicitly made discoverable by Rule 16). See *United States* v. *Dorfman, supra,* in which the district court distinguished *Crisona* and held that a defendant could not inspect and copy oral statements made to a government witness and subsequently put into a written statement, and that such material was available to a defendant only after the witness had testified at trial. In the other Second Circuit case cited by petitioner, *United States* v. *Percevault,* 490 F. 2d 126, the court held that Rule 16 did *not* authorize the district court to compel pretrial disclosure, over government objection, of written or oral statements of co-conspirators whom the government intended to call as witnesses at trial, and that the Jencks Act prohibited such disclosure.

Similarly, the decision of the District of Columbia Circuit in *United States* v. *Bryant,* 439 F. 2d 642, on which petitioners rely, is inapposite. In *Bryant* the government claimed to have lost a tape recording of a conversation between defendant and an undercover agent made by government agents. The court of appeals

Finally, we note that this case is apparently the first to be decided by an appellate court under the most recent amendments to the Rules, which became effective in December 1975, and which would govern further proceedings in this case.[7] Even if there were some question about the soundness of the court's construction of the rule—which we submit there is not—it would appear premature for this Court to attempt to resolve the question now, rather than await further consideration of the issue by the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
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Attorneys.

SEPTEMBER 1976.

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remanded the case solely for a determination of whether the government was either negligent or acting in bad faith and for a determination of the importance of the evidence lost. The court did not order disclosure of statements by prospective government witnesses. Moreover, this case, like *Crisona,* involved a tape-recorded statement of the defendant, as opposed to an oral statement, and it was only for this reason that Rule 16 was pertinent (see 439 F. 2d at 647). Furthermore, the statement was to a government agent, not a third-party, nongovernment agent witness.

[7]If anything, the amendments to Rule 16 weaken petitioners' position. In specifying that certain oral statements of the defendant could be ordered disclosed, the amended Rule limits disclosure to such statements when made "in response to interrogation by any person then known to the defendant to be a government agent."

DOJ-1976-09